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Supreme Court, U.S.
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IN THE
**Supreme Court of the United States**

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DARREL A. WESTON,
Staff Sergeant, United States Marine Corps,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Armed Forces

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I

**Whether the Court of Appeals for the Armed Forces erred in holding that *Georgia v. Randolph*, 547 U.S. 103 (2006), does not apply to the consent search of Petitioner's marital home where agents from the Marine Corps' Criminal Investigation Division (CID) first received Petitioner's unequivocal objection to a search of his marital home and then obtained consent from Petitioner's wife, both of whom were physically located in separate interrogation rooms aboard CID's building after being escorted to the CID building from their marital home.**

### II

**Whether the lower court erred in holding that *Georgia v. Randolph*, 547 U.S. 103 (2006), does not apply to the consent search of Petitioner's marital home where agents from the Marine Corps' Criminal Investigation Division (CID), after having received Petitioner's unequivocal objection to a search of his marital home, seized Petitioner's cellular telephone as he was mid-conversation with a criminal defense attorney, arrested Petitioner without probable cause, and held Petitioner incommunicado in a CID detention cell for two to three hours, until the search had concluded, thereby preventing Petitioner from communicating his objection to his wife and preventing Petitioner from entering his marital home and restating his objection.**

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I

The lower court erred in holding that *Georgia v. Randolph*, 547 U.S. 103 (2006), does not apply to the consent search of Petitioner's marital home where agents from the Marine Corps' Criminal Investigation Division (CID) first received Petitioner's unequivocal objection to a search of his marital home and then obtained consent from Petitioner's wife, both of whom were physically located in separate interrogation rooms aboard CID's building after being escorted to the CID building from their marital home.

II

**The lower court erred in holding that *Georgia v. Randolph*, 547 U.S. 103 (2006), does not apply to the consent search of Petitioner's marital home where agents from the Marine Corps' Criminal Investigation Division (CID), after having received Petitioner's unequivocal objection to a search of his marital home, seized Petitioner's cellular telephone as he was mid-conversation with a criminal defense attorney, arrested Petitioner without probable cause, and held Petitioner incommunicado in a CID detention cell for two to three hours, until the search was concluded, thereby preventing Petitioner from communicating his objection to his wife and preventing Petitioner from entering his marital home and restating his objection.**

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## PETITION FOR A WRIT OF CERTIORARI

Staff Sergeant Darrel A. Weston, United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-26a) is reported at 67 M.J. 390.

## JURISDICTION

The decision of the Court of Appeals for the Armed Forces was entered on June 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

## STATUTES AND REGULATIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the persons or things to be seized. U.S. CONST. amend. IV.

## STATEMENT

A general court-martial tried Staff Sergeant Darrel A. Weston and convicted him, contrary to his pleas, of one specification of Housebreaking under

Article 130, UCMJ, and two novel specifications of Invasion of Privacy under Article 134, UCMJ. 10 U.S.C. §§ 930, 934 (2005).

In its initial review of the case, a panel of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the search of Petitioner's marital home was unreasonable and violated Petitioner's Fourth Amendment rights; that the inevitable discovery exception to the exclusionary rule was not applicable; and that the evidence seized should have been suppressed pursuant to the exclusionary rule. *United States v. Weston*, 65 M.J. 774 (N.M.Ct.Crim.App. 2007).

On March 31, 2008, NMCCA, sitting *en banc*, reversed the panel's previous decision and held that the military judge did not abuse his discretion in denying the defense motion to suppress the items seized during the consent search of Petitioner's marital home. *United States v. Weston*, 66 M.J. 544 (N.M.Ct.Crim.App. 2008). NMCCA affirmed the findings and sentence. *Id.*

On June 11, 2009, the Court of Appeals for the Armed Forces affirmed the lower court and held that *Georgia v. Randolph*, 547 U.S. 103 (2006), did not apply to the facts of Petitioner's case. *United States v. Weston*, 67 M.J. 390 (C.A.A.F. 2009).

## REASONS FOR GRANTING THE PETITION

### I

**The lower court erred in holding that *Georgia v. Randolph*, 547 U.S. 103 (2006), does not apply to the consent search of Petitioner's marital home where agents from the Marine Corps' Criminal Investigation Division (CID) first received Petitioner's unequivocal objection to a search of his marital home and then obtained consent from Petitioner's wife, both of whom were physically located in separate interrogation rooms aboard CID's building after being escorted to the CID building from their marital home.**

Factual Background:

In the early afternoon hours of May 18, 2004, Staff Sergeant Marianne Ebner, U.S. Marine Corps, discovered what she believed to be a hidden video camera positioned in a restroom inside of the Law Center aboard Marine Corps Base Hawaii, Kaneohe Bay. App. 2a. The video camera at issue was a miniature video camera concealed in an electric razor which rested upon a wall locker shelf inside of the restroom. *Id.* Concerned that she may have been surreptitiously recorded, Staff Sergeant Ebner pried open the electric razor and discovered the concealed video camera. *Id.* Staff Sergeant Ebner immediately telephoned the Provost Marshal's Office (PMO) aboard Kaneohe Bay and reported her discovery. App. 3a. Later that same afternoon, Staff Sergeant Ebner telephoned Petitioner's wife,

Samantha Weston, and told her that Petitioner was secretly videotaping people in the restroom. *Id.*

At about 5:00 pm on May 18, 2004, Staff Sergeant Ebner met with Agent Jason Grimes of the Criminal Investigative Division (CID) aboard Kaneohe Bay. *See id.* Staff Sergeant Ebner gave the video camera to Agent Grimes and he began a criminal investigation by issuing a "BOLO"[1] alert for Petitioner, telling the local Military Police to look for Petitioner, and sending a uniformed Military Policeman (MP) in a marked MP vehicle to Petitioner's marital home aboard Marine Corps Base, Hawaii. App. 3a, 18a; Appellate Exhibit (AE) XXV at ¶¶ 3g, 3h.

May 18, 2004, the day on which the allegations against Petitioner first surfaced, and the evening on which the CID Agents searched Petitioner's marital home, was a Tuesday and a normal work day and school night for the Weston family. Just prior to the time that CID Agent Grimes sought to locate Petitioner, both Petitioner and Mrs. Weston had concluded their work days and both had already arrived at their home and were engaging in normal family time – Mrs. Weston was cooking dinner for her two school-age children, the children were doing their homework, and Petitioner was using the family's home computer to check his online course grades and to do his online course homework. *See* Record at 103-05. Sometime around 6:00 pm Petitioner left his home after telling his wife he had to go back to the office for a short period of time. *Id.* Shortly after 6:00 pm, and after having received Staff Sergeant Ebner's telephone call

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[1] "BOLO" stands for "be on the lookout for."

alleging that Petitioner was secretly videotaping people, Mrs. Weston left her home to meet Staff Sergeant Ebner. *Id.*

Mrs. Weston did not find Staff Sergeant Ebner, and Petitioner and his wife arrived back at their home separately, but simultaneously, between 6:00 pm and 7:00 pm. *See* App 3a, 18a; AE XXV at ¶ 3h. The uniformed MP and his vehicle were already waiting in front of the Westons' home. *Id.* The MP exited his vehicle and informed the Westons that Petitioner's presence was requested at the PMO office. App. 18a. Petitioner and his wife drove to the PMO building as the MP followed in his duty vehicle. *Id.*

At about 5:30 pm on May 18, 2004, CID Agent Crystal Stevenson received a telephone call from Agent Grimes asking for assistance. About twenty minutes later Agent Stevenson arrived at the CID office/PMO building aboard Kaneohe Bay and assumed the role of lead agent. Around 7:00 pm on May 18, 2004, Agent Stevenson saw Petitioner and his wife arrive together at the CID office. *See* App. 3a, 18a. Once the uniformed MP had escorted Petitioner and Mrs. Weston into CID's working spaces, Agent Stevenson directed that Petitioner and his wife be separated. *Id.* Petitioner and Mrs. Weston were then placed in separate interrogation rooms. *See id.*

Shortly before 8:00 pm on May 18, 2004, Agent Stevenson entered Petitioner's interrogation room. App. 3a, 18a. Agent Stevenson told Petitioner he was suspected of voyeurism and maltreatment of subordinates, and she administered a written Article 31(b), UCMJ/Fifth Amendment rights advisement. App. 3a, 18a-19a. Shortly after 8:00 pm on May 18,

2004, Petitioner signed the rights advisement, acknowledging that he understood his rights and invoking his right to remain silent and right to consult with an attorney. App. 3a, 19a. Agent Stevenson then asked Petitioner for consent to search his marital home. *Id.* Petitioner unequivocally objected to a search. *Id.*

Agent Stevenson then left the interrogation room leaving Petitioner in isolation. *Id.* Once Agent Stevenson left the interrogation room, Petitioner called his friend Robert "Bob" Fricke. *Id.* Mr. Fricke was a retired Marine Corps judge advocate who now worked on the island of Oahu as a defense attorney. *See* App. 3a. Mr. Fricke answered Petitioner's telephone call and the two discussed Petitioner's legal predicament, including Petitioner's right to remain silent and right to object to a search of his home. *Id.* As Petitioner was mid-conversation with Mr. Fricke, a CID Agent entered the interrogation room and escorted Petitioner into the working spaces of the CID office. *See id.* As Petitioner told Mr. Fricke "Bob I am in trouble. I am in trouble, Bob," Agent Stevenson ordered the seizure of Petitioner's telephone. App. 3a, 19a. Agent Stevenson then directed another CID Agent to escort Petitioner to another part of the PMO building where Petitioner was placed incommunicado in a detention cell for the next two to three hours.[2] *See* App. 19a.

Mere moments after Petitioner refused to give consent to a search of his marital home, Agent Stevenson entered Mrs. Weston's interrogation room,

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[2] CID Reports, Investigative Actions and Evidence Custody Receipts indicate that the search began at 9:02 pm, that the search ended at 9:28 pm and that the items were seized as of 10:02 pm, all on May 18, 2004.

and without informing Mrs. Weston that her husband had just refused consent, said "now it's your turn"[3] and asked Mrs. Weston for permission to search the marital home. App. 3a, 4a, 19a. Believing that her husband had already consented to a search, Mrs. Weston signed a written authorization permitting agents to search their marital home. App. 19a.

Agents Stevenson and Grimes, along with two other agents, searched Petitioner's home on the evening of May 18, 2004 while Petitioner was held incommunicado in the detention cell inside of the PMO building. App. 19a, 23a. Almost immediately after the search began, Mrs. Weston, who was watching the agents, received a telephone call from Mr. Fricke who was concerned about the family's welfare. App. 4a, 23a; AE XXV ¶ 3u. Mrs. Weston told Mr. Fricke that the family was physically okay and that CID Agents were searching the home. *Id.* A minute or two after their telephone call concluded, Mr. Fricke again telephoned Mrs. Weston and told her that her husband had refused consent and that she could withdraw her consent and make the agents leave her home. *Id.*; AE XXV at ¶ 3v. Mrs. Weston immediately asked Agent Stevenson if her husband had consented to a search of their marital home. *See id.*; AE XXV at ¶ 3v.

The investigators quickly recognized that their authority to search Petitioner's home was coming to a close. *See* App. 4a; AE XXV at ¶ 3x. Agent

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[3] Mrs. Weston testified at the suppression motion hearing that Agent Stevenson entered the interrogation room and said "Okay, your turn to sign", however the Military Judge indicated it was "not entirely clear that this statement was made as asserted by Mrs. Weston." AE XXV at ¶ 3l.

Stevenson testified at the suppression motion hearing that she "knew at that moment that since Staff Sergeant Weston had already called, that he [Mr. Fricke] was going to give advice to stop the search. As any good defense lawyer would do..." and consequently, Agent Stevenson ordered the CID Agents to "wrap it up." Record at 92. Once informed by Mr. Fricke of her legal rights and of her husband's earlier objection, Mrs. Weston withdrew consent and demanded a stop to the search. App. 4a, 23a; AE XXV at ¶ 3v.

The CID Agents stopped searching and removed the seized items from Petitioner's home. *Id.* The seized items were placed in CID's evidence room where they sat untouched for twenty-nine (29) days, until June 16, 2004–the date on which the Commanding General, Marine Corps Bases Hawaii signed a search authorization giving CID authorization to search the contents of the computer seized from Petitioner's home.[4] A forensic examination of Petitioner's computer yielded compromising images of Staff Sergeant Ebner, as well as images of her residence, that served as the basis for the underlying charges.

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[4] A computer forensic examination of the Dell desktop computer seized in Petitioner's home was completed by the Department of Defense Computer Forensic Laboratory (DCFL) on November 23, 2004. The contents of the computer included: (1) numerous electronic files containing pictures and videos of Staff Sergeant Ebner in various states of undress while using the restroom inside of the Law Center; and (2) various electronic files containing pictures taken inside of Staff Sergeant Ebner's home while the home was unoccupied. Staff Sergeant Ebner subsequently reviewed the electronic pictures and videos, declaring that the images/recordings were made unknowingly and without her consent.

Petitioner remained incommunicado in the detention cell for two to three hours, until the search of his home ended. App. 19a, 23a. While detained, Petitioner was never told that he was either under arrest or in custody, nor was he ever processed or booked as though he was under arrest or in custody. *See* App. 23a. Once the search ended, Petitioner was released from the detention cell and drove home.

**Argument Summary:**

The lower court erred by too narrowly interpreting this Court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), which holds that when law enforcement officials find themselves at a residence where two co-occupants are both physically present, and the first co-occupant refuses to permit a search of the premises, subsequent consent to search offered by the other co-occupant is not valid, rendering any warrantless search invalid and unreasonable as to the first co-occupant. *Randolph*, 547 U.S. at 120. Although Petitioner was in a CID interrogation room at the time he unequivocally objected to a search of his marital home (and not standing on the front steps of his home), a reasonable interpretation of *Randolph* and its reliance on the use of widely shared social expectations to determine the reasonableness of a consent search shows that the lower court erred in holding that *Randolph* does not apply.

Even if *Randolph* is to be read narrowly, the lower court erred in holding that there was no evidence in the record to establish that the CID Agents unfairly used their powers to complete their search wherein the CID Agents: (1) summoned

Petitioner to CID's offices, and thereby physically removed him from his marital home on what was a normal work and school night for the Weston family; (2) took Petitioner's cellular telephone away as he was mid-conversation with a criminal defense attorney from whom he was asking for legal advice; and (3) kept Petitioner incommunicado in a detention cell, despite the absence of a basis to arrest, for two to three hours, until the search of Petitioner's home was completed.

**Argument:**

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures by law enforcement personnel in areas and places where a person exhibits a subjective expectation of privacy and where society recognizes a reasonable (objective) expectation of privacy. U.S. CONST. amend. IV; *Katz v. United States*, 389 U.S. 347, 361 (1961) (Harlan, J., concurring); *see United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Nowhere are expectations of privacy more sacred than in the family home. *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). A search of a person's home, without a search warrant or authorization issued upon probable cause, is ordinarily unreasonable unless the search falls within one of the well-established exceptions to the warrant rule. *Randolph*, 547 U.S. at 109; *Groh v. Ramirez*, 540 U.S. 551, 564 (2004); *United States v. Karo*, 468 U.S. 705, 717 (1984).

An exception exists where an individual possessing authority over the premises voluntarily

consents to a search. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). Consent may be obtained from either the person whose property is to be searched, or "from a third party who possesses common authority over the premises." *Rodriguez*, 497 U.S. at 181 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); *Matlock*, 415 U.S. at 171. This exception is not without limitation. This Court's decision in *Randolph* holds that when law enforcement officials find themselves at a residence where two co-occupants are both physically present, and the first co-occupant refuses to permit a search of the premises, subsequent consent to search offered by the other co-occupant is not valid, rendering any warrantless search invalid and unreasonable as to the first co-occupant. *Randolph*, 547 U.S. at 120.

A.) The Holding of *Georgia v. Randolph* Should Apply to the Facts of This Case:

In the case *sub judice*, Agent Stevenson and Agent Grimes suspected Petitioner of secretly videotaping Staff Sergeant Ebner while she used the restroom inside of the Kaneohe Bay Law Center. *See* App. 3a, 18a-19a. Although the Agents had not discovered any incriminating pictures or videos, the Agents believed Petitioner's marital home contained incriminating pictures and/or videos. *See id.*; AE XXV at ¶¶ 3c-3i. While the record shows that the CID Agents desperately wanted to search Petitioner's marital home, there is no evidence in either the military judge's findings of fact, nor the record, that any of the CID Agents first considered obtaining a search authorization or conducting a warrantless seizure of Petitioner's marital home

until a search authorization could be obtained. Rather, the record establishes that the CID Agents' sole means of entering and searching Petitioner's marital home was by obtaining consent to search from either Petitioner or Mrs. Weston.

In denying the defense motion to suppress, the military judge made a finding of fact that under the totality of the circumstances the evidence clearly and convincingly established that Mrs. Weston's consent to search was voluntary. *See* App. 5a. The military judge made a conclusion of law that the search was reasonable as applied to Petitioner. *See id.* The military judge made his ruling on September 29, 2005, which was after the Georgia Supreme Court's decision in *State v. Randolph*, but prior to this Court's decision affirming the Georgia Supreme Court. *See State v. Randolph*, 278 Ga. 614 (Ga. 2004) (decided on November 8, 2004).

The lower court erred in holding that because Petitioner was not standing on the threshold to his marital home at the time he voiced his objection, the search was reasonable as applied to Petitioner. App. 8a-10a. Petitioner's case and *Randolph* both involved law enforcement officials seeking to search a marital home based upon an allegation of misconduct committed by the husband. *Randolph*, 547 U.S. at 107; App. 18a, 19a. Neither the CID Agents at Kaneohe Bay, nor the police officers in *Randolph* had a search warrant. *Id.* Both sets of officers first attempted to obtain consent to search by asking the husbands at issue. *Id.* Both husbands refused to consent, and when faced with these refusals, both sets of law enforcement officials turned to the co-located wives and asked for consent, which was subsequently given. *Id.* Searches of the marital

homes were conducted and items of evidentiary value and contraband were found. *Id.* The wives in both cases, after having granted consent, withdrew consent as the agents were mid-search. *Randolph*, 547 U.S. at 107; App. 23a. Each law enforcement agency stopped searching and then pursued a search warrant, which was obtained at a later time. *Id.*; App. 4a. Searches pursuant to the warrants yielded evidence that served as the basis for criminal charges. *Id.*

With one exception, the fact patterns in Petitioner's case and *Randolph* are nearly identical. In *Randolph*, the request to search colloquy occurred on the threshold to the Randolphs' marital home, whereas in Petitioner's case, the request to search colloquy between Agent Stevenson and Petitioner occurred in a CID interrogation room, after Petitioner had been escorted from his home to CID by a uniformed MP.

In determining whether a consent search under the Fourth Amendment is reasonable, great significance is to be afforded to what *Randolph* describes as "widely shared social expectations." *Randolph*, 547 U.S. at 111; Renee E. Williams, *Third Party Consent Searches After Georgia v. Randolph: Dueling Approaches to the Dueling Roommates*, 87 B.U.L. Rev. 937, 958 (2007) (hereinafter *Dueling Roommates*). If social custom or expectations are to be used to assess reasonableness, then nothing in existing social expectations or commonly held understandings about co-tenant rights and relationships supports the lower court's holding that in a disputed consent case involving co-occupants, the consenting person's physical location should trump the objecting person's voiced opposition.

*Randolph*, 547 U.S. at 111, 120. In fact, *Randolph* holds that customary social understandings dictate that a co-occupant's objection should prevail over a consenting co-occupant's authority. *Id.* at 113, 121.

B.) The Lower Court Misapplied Language from *Randolph*:

Petitioner acknowledges the following language from the majority opinion in *Randolph*:

> If those cases [*Matlock* and *Rodriguez*] are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy loses out. *Id.* at 121.

The lower court cited this language in its decision and held that physical presence at the place to be searched is the critical element in the analysis. App. 8a-10a. But, the lower court overlooked the fact that the defendants in *Matlock* and *Rodriguez* did not object to searches of their respective homes. *See Matlock*, 415 U.S. at 166; *Rodriguez*, 497 U.S. at 180. The lower court never addressed the distinction

between a *potentially* objecting co-occupant who *is not invited to take part in the request to search colloquy* (as was the case in *Matlock* and *Rodriguez*), and the facts of this case that involve a co-occupant (Petitioner) who *was asked for consent to search* his marital home, and *who unequivocally voiced his objection* to a search.

Although the lower court embraced the narrowest of interpretations of the holding in *Randolph*, the fact that the request to search colloquy in the case *sub judice* occurred in CID's interrogation rooms (as opposed to the front steps to Petitioner's marital home) has no constitutional significance. This Court held in *Randolph* that the reasonableness of a consent search is assessed in large part by societal expectations. *Randolph*, 547 U.S. at 111. Accordingly, reasonable social customs and expectations support the argument that dispositive weight should be given to the existence of a timely and voiced objection, and not to where in proximity to the search the request to search colloquy occurs. *See id.* at 113, 120-21; *see Moore v. Andreno*, 505 F.3d 203, 209 (2d Cir. 2007) (holding that "*Randolph* emphasized that the reasonableness of a consent search is informed by 'widely shared social expectations.'" (citation omitted)); *Dueling Roommates*, 87 B.U.L. Rev. at 958-60.

C.) The Split in United States Circuit Courts of Appeals:

The lower court followed the holdings of decisions from the Seventh and Eighth Circuit Courts of Appeals. But, a decision from the Ninth Circuit Court of Appeals and well-reasoned dissenting opinions from the Seventh and Eighth

Circuit Courts of Appeals support Petitioner's argument.

(1) United States Court of Appeals for the Ninth Circuit:

On February 20, 2008, a panel from the Ninth Circuit Court of Appeals decided a case with facts very similar to the facts in the case *sub judice*. In *United States v. Murphy*, Mr. Murphy appealed the District Court's denial of his motion to suppress evidence of methamphetamine manufacturing seized following the searches of storage units in which Mr. Murphy was living. *United States v. Murphy*, 516 F.3d 1117, 1119 (9th Cir. 2008). The second search of Mr. Murphy's storage units is the relevant search for purposes of this petition.

In August of 2004, police officers arrived at some storage units in which they knew Mr. Murphy was living. *Id.* The police officers knocked on one of the storage units, Mr. Murphy appeared, and the police officers asked Mr. Murphy for permission to search the storage units. *Id.* Mr. Murphy objected to a search and was arrested based upon the agents' plain view of methamphetamine manufacturing equipment. *Id.* at 1119-20. Mr. Murphy was then taken to jail. *Id.*

Two hours later, an individual named Mr. Roper arrived at the crime scene, explained that he was the individual who was actually renting the storage units, and gave the police officers consent to search the storage units. *Id.* at 1120. A search resulted in the seizure of a methamphetamine lab. *Id.*

On appeal the government argued that Mr. Roper's consent justified the search of the storage

units despite Mr. Murphy's voiced objection. *Id.* at 1121. The government argued that the holding in *Randolph* did not apply to Mr. Murphy's case because Mr. Murphy was not the actual renter of the storage unit, and because Mr. Murphy was not physically present and objecting to a search at the time the police officers asked Mr. Roper for consent to search the storage units. *Id.* at 1122. The Ninth Circuit held that neither distinction was legally meaningful and that the search of the storage units conducted two hours after Mr. Murphy objected violated Mr. Murphy's Fourth Amendment rights. *Id.*

In particular, the Ninth Circuit noted that the "important question is not who possesses a property right, but rather what are the dictates of 'widely shared social expectations.'" *Id.* at 1123 (citing *Randolph*, 547 U.S. at 111). The Ninth Circuit held that it saw no reason why Mr. Murphy's voiced objection to the search of the storage units should be vitiated by his absence from the scene following his arrest and subsequent transport to jail. *Murphy*, 516 F.3d at 1124. The Ninth Circuit went on to hold that:

> When a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant. *Id.*

Thus, the Ninth Circuit's interpretation of *Randolph* is the same as both Petitioner's interpretation and the dissenting judges' interpretation in the *Henderson* and *Hudspeth* opinions discussed *infra*. Namely, that using widely shared social expectations in determining the reasonableness of consent searches means that great significance should be given to whether a co-occupant voices an objection to the search of the premises and whether the objection is timely. Physical presence of the objecting co-occupant can be a potential factor, but it should not be outcome determinative.

(2) United States Court of Appeals for the Eighth Circuit:

Sitting *en banc*, the Eighth Circuit Court of Appeals decided *United States v. Hudspeth* on March 11, 2008. 518 F.3d 954 (8th Cir. 2008). The facts in *Hudspeth* are similar to Petitioner's case but not identical. In July, 2002, Missouri State Troopers executed a search warrant at Mr. Hudspeth's business. *Id.* at 955. The troopers were searching for evidence that Mr. Hudspeth was using his business to sell large quantities of pseudoephedrine tablets. *Id.* As the search was progressing, officers found child pornography on Mr. Hudspeth's business computer and homemade compact discs (CDs). *Id.* Mr. Hudspeth told the troopers that he downloaded the child pornography images from the internet and burned the images onto CDs. *Id.* Mr. Hudspeth was then arrested for possession of child pornography. *Id.*

Believing that Mr. Hudspeth's home computer likely contained additional child pornography, the troopers asked Mr. Hudspeth for consent to search

his home computer. *Id.* Mr. Hudspeth refused to give consent and was transported to jail. *Id.* Once Mr. Hudspeth was placed in jail, the troopers went to Mr. Hudspeth's home where they found Mrs. Hudspeth present. *Id.* One of the troopers told Mrs. Hudspeth that her husband had been arrested for possessing child pornography and that the troopers wished to search her home. *Id.* The troopers did not inform Mrs. Hudspeth that her husband had refused to consent to a search of the marital home. *Id.* at 955-56. Mrs. Hudspeth initially refused to consent, but then acquiesced once she learned that the troopers were going to conduct a warrantless seizure while they sought a search warrant. *Id.* The tTroopers then conducted a search of the Hudspeths' home and seized a home computer and more CDs that contained child pornography. *Id.* at 956.

Mr. Hudspeth entered a conditional guilty plea to possessing child pornography while preserving his right to appeal the denial of his motion to suppress. *Id.* The issue before the Eighth Circuit was whether, in light of *Randolph*, Mr. Hudspeth's objection to a search of his home and home computer should have overruled Mrs. Hudspeth's subsequent consent. *Id.* at 957. The *Hudspeth* majority answered the above question in the negative.

The *Hudspeth* majority interpreted *Randolph* narrowly and held that in order to fall within the holding of *Randolph* a co-occupant must be physically present at the premises to be searched and must immediately object to the search. *Id.* at 959-60. The *Hudspeth* majority believed the narrow interpretation was appropriate given the language in *Randolph* stating that *Matlock* and *Rodriguez* (two

cases in which the defendants did not object to searches) were not overruled. *Id.* at 959. The *Hudspeth* majority dismissed Mr. Hudspeth's argument that social custom would dictate that one spouse's objection to a search should trump another spouse's subsequent consent, even if the objecting spouse is at a location physically removed from the premises to be searched. *Id.* at 960. Ultimately the *Hudspeth* majority concluded that Mr. Hudspeth's Fourth Amendment rights were not violated and that the search of his home and home computer were reasonable. *Id.* at 961.

Eighth Circuit Judge Melloy, along with two other judges, dissented and wrote that Mr. Hudspeth's Fourth Amendment rights were violated and that the search of Mr. Hudspeth's home and home computer were unreasonable. *Id.* at 961-62 (Melloy, J., dissentiong). Petitioner contends that the *Hudspeth* dissenting opinion provides the most reasonable interpretation of *Randolph*.

The *Hudspeth* dissenters disagreed with the majority's opinion that physical presence is the *sine qua non* of the analysis. Rather, the dissenters argued that the controlling factors in the analysis should be whether the co-occupant voiced his objection to the search and whether that objection was timely. *Id.* at 962.

The dissenters further argued that the language in *Randolph* indicating that *Matlock* and *Rodriguez* were not overruled does not mean physical presence is the only factor to be considered in analyzing whether the government's search was reasonable. *Id.* As the *Hudspeth* dissenters correctly point out, the facts in Mr. Matlock's case uncontrovertibly established that Mr. Matlock did

not voice an objection to the search of his home, nor was he asked by the police officers for consent to search. *Id.* (citing *Matlock*, 415 U.S. at 166). The *Hudspeth* dissenters also correctly point out that the facts in Mr. Rodriguez's case uncontrovertibly established that Mr. Rodriguez did not voice an objection to a search of his apartment, nor was he asked by the police officers for consent to search. *Id.* (citing *Rodriguez*, 497 U.S. at 180). The dissenters assail the *Hudspeth* majority for "gloss[ing] over the difference between lack of consent and express objection" and for "focus[ing] on geography, concluding that the location of a defendant, not whether he expressly objects, is determinative." *Id.*

The dissenters adeptly point out that there is a difference between a co-tenant who is "nonconsenting" to a search, and one who is vocally objecting. *Id.* The former simply has not agreed to or authorized a search, whereas the latter has manifested an objection to a search. *Matlock* and *Rodriguez* involve defendants who fall into the former category, that is, each was a nonconsenting co-occupant to the premises that were searched. Accordingly, the decisions in *Matlock* and *Rodriguez* can co-exist with a more expansive reading of *Randolph* in a case where one co-occupant's consent to search is deemed invalid because a second co-occupant suspect has expressly voiced an objection to a search, regardless of the objecting co-occupant's physical presence or absence at the time the request to search colloquy takes place. *See* Williams, *Dueling Roommates*, 87 B.U.L. Rev. at 955.

Just as the *Hudspeth* dissenters criticized the *Hudspeth* majority's failure to recognize the differences between the facts in *Hudspeth* and those

in *Matlock* and *Rodriguez*, Petitioner submits that the lower court (1) failed to appreciate the differences between the facts in Petitioner's case and those in *Matlock* and *Rodriguez*; and (2) failed to recognize that a broader interpretation of *Randolph* neither explicitly nor implicitly overrules *Matlock* and *Rodriguez*.

A broader reading of *Randolph* does not undercut the holdings of *Matlock* and *Rodriguez*. The outcomes in *Matlock* and *Rodriguez* would remain the same regardless of those two suspects' presence or absence at the time law enforcement officials obtained consent from their co-occupants since neither Mr. Matlock nor Mr. Rodriguez voiced an actual objection to the search.

Thus, Petitioner agrees with the *Hudspeth* dissenters who argue that the *Hudspeth* majority misinterpreted the following *Randolph* language: "the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Randolph*, 547 U.S. at 121. This language does not mean that a co-occupant who is located away from the premises to be searched, but who is a part of the request to search colloquy and who does voice a timely objection to the search loses out. *Hudspeth*, 518 F.3d at 962 (Melloy, J., dissenting). Petitioner agrees with the *Hudspeth* dissenters that what should be outcome determinative is whether the co-occupant voiced his objection and whether that objection was timely, not the geographic proximity of the objecting co-occupant in relation to the premises to be searched. *Id.* at 962-63. Thus, in a case where law enforcement officials are faced with a disputed consent to search, and the objection to the search is made in a timely fashion, a warrantless search of shared premises is not

reasonable as applied to the objecting co-occupant, regardless of where that objection is made.

(3) United States Court of Appeals for the Seventh Circuit:

On June 27, 2008, in *United States v. Groves*, the Seventh Circuit Court of Appeals affirmed the District Court's denial of Mr. Groves' motion to suppress items seized during a search of his apartment and held that "*Randolph* expressly disinvites anything other than the narrowest of readings." *United States v. Groves*, 530 F.3d 506, 508, 512 (7th Cir. 2008). In *Groves*, police officers went to Mr. Groves' apartment and asked him for consent to search, which he unequivocally refused. *Id.* at 508. A second cadre of law enforcement officials returned to Mr. Groves' apartment sixteen days later, at a time when Mr. Groves was not physically present (he was at work), and obtained consent to search from Mr. Groves' girlfriend. *Id.* In affirming the lower court's decision, the *Groves* Court held that because Mr. Groves was not physically standing at the front door to his apartment and objecting at the time the officers asked Mr. Groves' girlfriend for consent, *Randolph* did not apply. *Id.* at 512.

Petitioner contends that the decision in *Groves* should not control the holding in the case *sub judice* for two reasons. First, the *Groves* Court gives no consideration to *Randolph's* holding that in assessing reasonableness in consent searches, "great significance [is to be] given to widely shared social expectations." *Randolph*, 547 U.S. at 111. The analysis used in *Groves* hinges solely on an assessment of geography that asks where was the

defendant standing at the time law enforcement officials sought consent to search? Under *Groves*, a defendant loses out if he is located any place other than the threshold to his residence, since no consideration is to be given to widely shared or commonly held social understandings. *Groves*, 530 F.3d at 511-12.

Second, the facts in *Groves* are distinguishable from the case at bar in that at the time police officials returned to Mr. Groves' apartment for a second time, there was no evidence in the record indicating that Mr. Groves' absence from the apartment was in any way facilitated or caused by the efforts of the police officers. *Id.* at 508, 512. The facts in Petitioner's case show that but for the actions of the CID Agents, Petitioner would have been physically present at his marital home and vocally objecting to a search. *See supra* pp. 4-9.

In *United States v. Henderson*, in a 2-1 decision, the Seventh Circuit reversed the District Court's decision suppressing items seized during a search of Mr. Henderson's home. *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008). The *Henderson* Court held that the police may conduct a warrantless search of a person's residence in a case where a co-occupant, who has previously objected to a search, is arrested and physically removed from the premises to be searched, and another co-occupant subsequently gives consent. *Id.* at 781-84. The facts in *Henderson* established that police officers responded to Mr. Henderson's home after a report of a domestic dispute. *Id.* at 777. Police officers encountered Mr. Henderson's wife on the lawn of her home wherein she said that Mr. Henderson had physically abused her, that weapons were in the

home, and that Mr. Henderson was also inside of the home. *Id.* Police officers entered Mr. Henderson's home and found Mr. Henderson in the living room. *Id.* Mr. Henderson uttered a profanity and told the police officers to get out of his home before officers even asked for permission to search. *Id.* at 777-78. Mr. Henderson was arrested for domestic battery and taken to the local police station. *Id.* at 777. Once Mr. Henderson had been removed from the scene, police officers asked Mrs. Henderson for permission to search the home. *Id.* Mrs. Henderson consented to a search and numerous firearms, drugs and drug paraphernalia belonging to Mr. Henderson were seized. *Id.*

In reversing the District Court's ruling suppressing the evidence seized, the *Henderson* Court held that Mr. Henderson's case was distinguishable from *Randolph* because police officers obtained Mrs. Henderson's consent after Mr. Henderson was physically removed from the premises to be searched. *Id.* at 783-84. Although the *Henderson* Court considered the social expectations theory of *Randolph*, the *Henderson* Court held that *Randolph* does not apply because there is "no social convention that requires the visitor to abstain from entering once the objector is no longer on the premises; stated differently, social custom does not vest the objection with perpetual effectiveness." *Id.* at 785.

Seventh Circuit Judge Rovner dissented and wrote that in a case where a co-occupant has voiced an objection to a search while physically present within the residence to be searched, the objecting co-occupant "has already done all that he can do to protect his privacy interest – he has told the visitor

to leave." *Id.* at 787 (Rovner, J., dissenting). Thus, a visitor who was aware of Mr. Henderson's objection to the entry of his home would not reasonably believe he or she was welcome, even if the objecting co-occupant left the premises. *Id.*; Matthew W.J. Webb, *Third-Party Consent Searches After Randolph: the Circuit Split Over Police Removal of an Objecting Tenant*, 77 Fordham L. Rev. 3371, 3408 (2009).

The decision in *Henderson* should not control the holding in the case *sub judice*. The facts in *Henderson* are distinguishable from the case at bar because at the time the police officers arrested Mr. Henderson, there was a clear basis to make the arrest and transport Mr. Henderson to the local police station for booking. The facts in Petitioner's case show that there were no reasonable grounds to arrest Petitioner at the time he was brought to the CID office. But for the actions of the CID Agents, Petitioner would have been physically present at his marital home and vocally objecting to a search at the time the CID Agents sought permission to search. *See supra* pp. 4-9; App. 23a-26a. Second, Petitioner disputes the majority's interpretation of what is reasonable under *Randolph's* "social expectations paradigm" and embraces Judge Rovner's opinion in which he writes: "I very much doubt that a social visitor would feel welcome in a shared residence once the visitor has been told by one of the tenants to stay out..." *Henderson,* 536 F.3d at 787 (Rovner, J., dissenting).

## II

**The lower court erred in holding that *Georgia v. Randolph*, 547 U.S. 103 (2006), does not apply to the consent search of Petitioner's marital home where agents from the Marine Corps' Criminal Investigation Division (CID), after having received Petitioner's unequivocal objection to a search of his marital home, seized Petitioner's cellular telephone as he was mid-conversation with a criminal defense attorney, arrested Petitioner without probable cause, and held Petitioner incommunicado in a CID detention cell for two to three hours, until the search had concluded, thereby preventing Petitioner from communicating his objection to his wife and preventing Petitioner from entering his marital home and restating his objection.**

Even if the lower court's interpretation of *Randolph's* main holding is correct, an exception exists where there is evidence that law enforcement officials improperly removed a co-occupant from the premises for the purpose of avoiding his objection to the search. *Randolph*, 547 U.S. at 121. The lower court erred in holding that the exception does not apply in Petitioner's case despite a lack of evidence to base Petitioner's warrantless arrest and despite clear evidence of the CID agents' efforts to (i) prevent Petitioner from in any way communicating his objection to his wife or his lawyer; and (ii) prevent Petitioner from entering his marital home until the search was concluded. App. 10a-11a.

The majority in *Randolph* acknowledged that it was drawing a fine line between those co-occupants who would fall within the holding's

purview and those who would not. *Randolph*, 547 U.S. at 121. The majority also held that those co-occupants not covered by the holding in *Randolph* may still possess a valid challenge to a search if there is evidence that law enforcement officials physically removed a potentially objecting co-occupant from the premises to be searched so that the co-occupant would not be able to voice his objection to the search. *Id.* The salient language used by the majority in *Randolph* follows below:

> So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection...[the rule of law announced in the holding may apply.] *Id.*

The majority in *Randolph* did not illustrate what types of evidence would indicate that law enforcement nefariously manufactured a co-occupant suspect's absence from the site to be searched. However, the facts in this record demonstrate that the CID Agents' removal of Petitioner from his marital home was done for the sake and purpose of limiting the legal effect of Petitioner's voiced objection to the search.

In the case *sub judice*, the evidence in the record establishes that but for the actions of the CID Agents and the MPs on the night of May 18, 2004, Petitioner (1) would have been physically present at his marital home at the time the CID Agents arrived and sought consent to search; (2) would have voiced

his objection to a search of his marital home as soon as a request for permission to search was made; and (3) would have been physically present and voicing an objection to any ongoing search at Petitioner's marital home based upon consent from Petitioner's wife.

The evidence produced during the motions hearing establishes that had Petitioner known that the CID Agents were going to search his marital home over his objection; had he been able to continue his conversation with Mr. Fricke; and had he not been held incommunicado in the detention cell for two to three hours as the search took place, Petitioner would have done everything possible to prevent the CID Agents from searching his marital home. Petitioner's objection to a search of his marital home and Mr. Fricke's knowledge of criminal law and recommendations to the Weston family to invoke their rights and to refuse a warrantless search of their marital home are clear. It is also clear that but for the actions of the CID agents in placing a "BOLO" alert on Petitioner, sending a uniformed MP to the Westons' home in order to secure Petitioner's presence at CID, taking Petitioner's cellular telephone away from Petitioner as he was mid-conversation with Mr. Fricke and was discussing how to exercise his legal rights, and then placing Petitioner incommunicado, in a detention cell for two to three hours, while his marital home was searched, the CID Agents would not have had valid consent to search the Westons' marital home on the night of May 18, 2004. The CID Agents in this case improperly and unfairly used their powers to (1) make it impossible for Petitioner to personally object while standing on the threshold to his home

following Mrs. Weston's consent, (*see Gates v. Texas Dept. of Protective Svcs.*, 537 F.3d 404, 426 (5th Cir. 2008) (holding that if one physically present co-occupant gives police officials consent to search a residence, and while the search is ongoing a second co-occupant arrives at the premises and voices an objection to the search, the latter's objection requires the police to stop searching and leave the residence absent a court order or exigent circumstances)); and (2) to prevent Petitioner for conveying his wishes to his wife, who was inside of the home at the time the search began.

Agent Stevenson's testimony at the suppression motion hearing belies the lower court's opinion that "there is no evidence that the agents removed Appellant from his home so that he could not effectively object to its search..." App. 11a. To the contrary, Agent Stevenson, who said she had conducted "thousands" of searches and seizures, testified that after she obtained Mrs. Weston's consent to search (without informing Mrs. Weston that her husband had just moments earlier objected), she ordered the other CID Agents to take Petitioner's cellular telephone away from him as he was mid-conversation with Mr. Fricke, and then she ordered Petitioner to be placed incommunicado in a detention cell. App. 3a, 19a. The only explanation for these actions are that they served as effective ways of preventing anyone from interfering or objecting to Agent Stevenson's desire to conduct a warrantless search of Petitioner's home.

Agent Stevenson's intent becomes even clearer when she testified to the following concerning her knowledge about how the warrantless search could

be interfered with as she and the other agents were searching the Westons' home:

> I heard the phone ring [while at the Westons' home]. Then I heard, I believe, her daughter walk up the stairs and say it was Bob Fricke or Colonel Fricke on the telephone. I knew at that moment that since Staff Sergeant Weston had already called, that he [Mr. Fricke] was going to give advice to stop the search. As any good defense lawyer would do, they would do that. So at that moment, I told everybody to wrap it up. *See supra* pp. 7-8.

Agent Stevenson knew Petitioner was discussing his rights with Mr. Fricke when she overheard him speaking on the telephone outside of the CID interrogation rooms, and Agent Stevenson knew that Mr. Fricke's advice to Petitioner would ultimately interfere with her warrantless search of the marital home. To minimize the interference, Agent Stevenson prohibited Petitioner from speaking with Mr. Fricke and prohibited him from making a further objection (and from communicating his objection to his wife) by arresting Petitioner without probable cause and by placing Petitioner incommunicado in a detention cell while the search of his marital home took place. The actions of the

CID Agents justify an exception to the purported physical presence rule of *Randolph*, and consequently, the lower court erred in holding that *Randolph* does not apply.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A

**UNITED STATES, Appellee v. Darrel A. WESTON, Staff Sergeant U.S. Marine Corps, Appellant**
**No. 08-0594**
**Crim. App. No. 200600985**

**UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

***67 M.J. 390, 2009 CAAF LEXIS 642***

**Argued March 17, 2009**
**Decided June 11, 2009**

STUCKY, J., delivered the opinion of the court, in which BAKER and RYAN, JJ., joined. EFFRON, C.J., and ERDMANN, J., each filed a separate concurring opinion.

Counsel

For Appellant: Major Richard D. Belliss, USMCR (argued).

For Appellee: Captain Geoffrey S. Shows, USMCR (argued); Colonel Louis J. Puleo, USMC and Major Tai D. Le, USMC (on brief); Commander Paul C. LeBlanc, JAGC, USN and Brian K. Keller, Esq.

Military Judge: B.W. MacKenzie

Judge STUCKY delivered the opinion of the Court.

There was something odd about the electric razor in the bathroom. Staff Sergeant (SSgt) ME, a female Marine court reporter, noticed it sitting on the wall locker shelf in the bathroom she shared with Appellant, the senior court reporter, whom she knew to be experienced with computers and surveillance equipment. SSgt ME typically changed clothes in the bathroom and for the past year had felt that she was being watched, a feeling that she attributed to paranoia. But this time the circumstances were simply too odd and her suspicions too strong. SSgt ME took the razor with her when she left work that day. Her attempt to open the razor's casing ended at Sears with a "Torque" T7 screwdriver. Inside the razor she found a camera.

We granted review in this case to determine two issues. First, whether the search of Appellant's house was reasonable where Appellant objected to the search, but was not physically present when the search was conducted pursuant to his wife's consent. Second, if, as Appellant argues, the search was unreasonable under *Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006)*, whether the inevitable discovery exception would allow admission of the seized evidence. As we find that the search was reasonable under these circumstances, we do not reach the second issue.

I. *Background*

Following her discovery of the hidden camera, SSgt ME contacted both the Provost Marshal's Office (PMO) and Appellant's wife to report the discovery. When Appellant and his wife arrived at their home that evening, they were met by military police who, after granting the wife permission to accompany Appellant, followed them to the PMO where they were placed in separate rooms.

Once in the room, agents of the Criminal Investigative Division informed Appellant of his rights under Article 31, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 831 (2000)*, and Military Rule of Evidence (M.R.E.) 305. Appellant promptly invoked his right to remain silent and to consult with an attorney. When the agent questioning Appellant asked for consent to search Appellant's home, Appellant unequivocally objected. The agent then left Appellant alone in the room. Appellant used the time to call a friend, Robert Fricke, who was a former military judge and Marine Corps judge advocate. That conversation was interrupted when the agents took Appellant's cellular phone away and placed him incommunicado in a holding cell.

Following Appellant's refusal to consent to a search of the home, the same agent who asked Appellant for consent asked Mrs. Weston, who was sitting in a different room, the same question. Mrs. Weston consented to the search. She did not ask

whether the investigators had asked her husband to consent, and the investigators did not inform her that he had refused consent.

The search of the house Appellant and his wife lived in proceeded with Mrs. Weston present. During the search Mr. Fricke telephoned Mrs. Weston twice. The first call was to inquire as to the family's welfare; the second was to inform Mrs. Weston that she could, and in Mr. Fricke's opinion should, withdraw her consent to the search. Mrs. Weston did so immediately. The agents searching the home gathered up the materials they had already seized and left the home. Among those items was Appellant's computer. A subsequent search of the computer revealed nonconsensual images of SSgt ME changing her clothes and using the bathroom. The computer also contained photos of the interior of SSgt ME's house.

II. *Procedural Posture*

Appellant was charged with three violations of the Uniform Code of Military Justice (UCMJ). The first two charges were for assault and housebreaking, under Articles 128 and 130, UCMJ, *10 U.S.C. §§ 928, 930 (2000).* The third charge involved two specifications of invasion of privacy and one specification of wrongfully impeding an investigation. Article 134, UCMJ, *10 U.S.C. § 934 (2000).* A general court-martial with members found

Appellant guilty of housebreaking and of the two specifications of invasion of privacy.

Prior to trial, Appellant moved to suppress the evidence that was seized from his home. The military judge denied this motion. On appeal, a panel of the United States Navy-Marine Corps Court of Criminal Appeals (CCA) held that the search of Appellant's home was unreasonable and violated Appellant's *Fourth Amendment* rights. *United States v. Weston, 65 M.J. 774, 785 (N-M. Ct. Crim. App. 2007).* The Government moved for a rehearing en banc. On rehearing, the CCA reversed the panel, holding that the military judge did not abuse his discretion in denying the defense motion to suppress. *United States v. Weston, 66 M.J. 544, 546-47 (N-M. Ct. Crim. App. 2008).*

III. *Discussion*

Appellant argues that the search of his home was unreasonable under *Georgia v. Randolph*, and, therefore, the en banc CCA opinion must be overturned. We disagree. The facts of this case are distinguishable from those of *Randolph*, and are more like those of the cases *Randolph* specifically preserved.

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Gallagher, 66 M.J. 250, 253 (C.A.A.F. 2008).* We review findings of fact for clear error and conclusions

of law de novo. *Id. at 253* (citing *United States v. Flores, 64 M.J. 451, 454 (C.A.A.F. 2007)).*

The *Fourth Amendment* provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

*U.S. Const, amend. IV.*

Ordinarily, warrantless entry into a person's house is unreasonable per se. *Randolph, 547 U.S. at 109.* While the rule against warrantless entry is vigilantly guarded, the voluntary consent of an individual possessing authority is one "carefully drawn" exception. *Jones v. United States, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514, 1958-2 C.B. 1005 (1958); see Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).* Voluntary consent to search may be obtained from the person whose property is to be searched or from a fellow occupant who shares common authority over the property. *United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); United*

*States v. Gallagher, 66 M.J. 250, 253 (C.A.A.F. 2008).*

In *Matlock*, consent to search was granted by the co-occupant, who was on the premises while the defendant was detained in a police car nearby. *Matlock, 415 U.S. at 166*; *Randolph, 547 U.S. at 109-10.* Ultimately, the Court determined that "the consent of one who possesses common authority [or other sufficient relationship] over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Matlock, 415 U.S. at 170-71*; *see Gallagher, 66 M.J. at 253*; *United States v. Rader, 65 M.J. 30, 30-31 (C.A.A.F. 2007).* Common authority over a home extends to all items within the home, unless the item reasonably appears to be within the exclusive domain of the third party. *Gallagher, 66 M.J. at 253-54* (holding that an unlocked briefcase located within an attached garage, which had been converted into a den, fell within the common authority of Appellant's wife). Additionally, common authority can be obtained via mutual use of the property by a person with joint access or control. *Rader, 65 M.J. at 33-34* (quoting *Matlock, 415 U.S. at 171 n.7*) (holding that a roommate with shared access to another's computer has common authority over the computer and can grant consent to search).

Appellant wishes us to find that the search of his home was unreasonable in light of *Randolph*. In

*Randolph*, the Supreme Court addressed the application of the *Matlock* rule where the nonconsenting occupant was "physically present" when he refused permission to search. *Randolph, 547 U.S. at 109.* The Supreme Court held that express refusal by a physically present co-occupant renders a warrantless search unreasonable and invalid as to him. *Id. at 106.* The specific combination of the physical presence of the cotenant at the scene, plus the cotenant's "immediate challenge" renders the warrantless search unreasonable and invalid. *Randolph, 547 U.S. at 111, 113.*

The distinction between an objection to a search lodged by a cotenant who is physically present and one who is not is a formal one, but it is the one explicitly drawn by the Supreme Court in *Randolph*:

> If those cases [*Matlock* and *Rodriguez*] are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.
>
> This is the line we draw, and we think the formalism is justified.

*Randolph, 547 U.S. at 121.*

In his separate opinion, Judge Erdmann distinguishes a "nonconsenting" cotenant, such as Matlock (sitting in the squad car) and Rodriguez (asleep in another room), from an "objecting" one. *United States v. Weston*, M.J. (7) (C.A.A.F. 2008) (Erdmann, J., concurring in the result). This distinction is not compelled by Supreme Court precedent, and we are unwilling to draw it. The term "nonconsenting" is general and inclusive. It encompasses all who do not expressly consent, including those who refuse, those who remain silent, and those who are not asked. Reasonableness of a warrantless search due to voluntary consent is a simple binary proposition; either there is consent or there is not. *Matlock* determined that a cotenant can provide consent to search, and *Randolph* merely laid out the limited circumstances under which a cotenant's objection can overrule that consent.

Appellant urges us to extend the holding of *Randolph* and adopt the reasoning of the United States Court of Appeals for the Ninth Circuit in *United States v. Murphy*, where the court discounted the significance of the physical presence and immediate challenge of the party not consenting to the search. *516 F.3d 1117, 1123-24 (9th Cir. 2008).* Appellant further argues that we should look more generally to society's widely shared social

expectations in determining the reasonableness of consent searches. We decline to do so.

While "widely shared social expectations" underlie the reasoning in *Randolph, 547 U.S. at 111* ("The constant element in assessing *Fourth Amendment* reasonableness in the consent cases, then, is the great significance given to widely shared social expectations . . ."), the Supreme Court specifically declined to overrule *Matlock* and drew the line with the physical presence at the threshold. *See id. at 120-22.* We decline to adopt the Ninth Circuit's reasoning and thus do not expand the holding of *Randolph* at the expense of *Matlock.*

Where one party has joint access and control to a property and voluntarily consents to a search, the warrantless search is reasonable. Rather than *Murphy*, we find more persuasive the approach adopted by the United States Courts of Appeals for the Seventh and Eighth Circuits, which held that *Randolph* did not "permanently disabl[e] [a cotenant's] shared authority to consent to an evidentiary search of her home." *United States v. Henderson, 536 F.3d 776, 777 (7th Cir. 2008); see United States v. Hudspeth, 518 F.3d 954, 960-61 (8th Cir. 2008).*

Appellant also argues that the Criminal Investigative Division (CID) agents removed him from his home in order to prevent him from voicing an effective objection to the search. *Randolph*

recognizes an exception to its holding in cases where there is evidence "that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208.* In such cases, a search consented to by the remaining tenant may not be reasonable. *Id.* In this case, however, there is no evidence that the agents removed Appellant from his home so that he could not effectively object to its search; the objection was not lodged until Appellant was at the PMO and there were no circumstances that should have led the police to anticipate it.

Here, the search was reasonable; the CID obtained consent from Appellant's wife who possessed common authority over the premises. As in *Matlock*, Appellant was a nonconsenting party who shared authority over the premises, but was not present to provide immediate challenge to his wife's consent to search. The "fine line" drawn by the Supreme Court in *Randolph* indicates that physical presence and immediate challenge is required for the nonconsenting tenant's objection to nullify the reasonableness of the search. That was not the case here, thus the holding of *Randolph* does not apply and the search was reasonable.

IV. *Decision*

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CONCUR BY: EFFRON; ERDMANN

EFFRON, Chief Judge (concurring in the result):

I agree with that portion of Judge Erdmann's separate opinion highlighting the distinctions between the present case and the guidance of *Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006)*, and *United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974)*. *See* M.J. (3-7) (Erdmann, J., concurring in the result). In that context, I have reservations about the majority opinion's attempt to define the *Randolph-Matlock* relationship, *see* M.J. (6-10), particularly in view of the uncertain contours of "widely shared social expectations" and "immediate challenge [s]" under *Randolph, 547 U.S. at 111, 113*. Instead, I would resolve the present appeal under the established principles of inevitable discovery.

As a general matter, "[e]vidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused . . . ." Military Rule of Evidence (M.R.E.) 311(a). Among the exceptions to this general rule, the inevitable discovery doctrine provides that evidence from an otherwise unlawful

search or seizure "may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." M.R.E. 311(b)(2); *see Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); United States v. Wallace, 66 M.J. 5, 10 (2008); Manual for Courts-Martial, United States*, Analysis of the Military Rules of Evidence 311(b)(2) app. 22 at A22-17 (2008 ed.). In applying the inevitable discovery doctrine, we bear in mind that it is an exception that must be interpreted narrowly so that it does not subsume the general prohibition on the use of evidence obtained from unlawful searches. *See* 6 Wayne R. LaFave, *Search and Seizure*, §11.4(a) (4th ed. 2004). Assuming that the search of Appellant's home was unlawful, *see* M.J. (1, 4-8) (Erdmann, J., concurring in the result), the present case falls well within the narrow confines of the inevitable discovery exception.

To demonstrate inevitable discovery, the prosecution must establish by a preponderance of the evidence that "when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Kozak, 12 M.J. 389, 394 (C.M.A. 1982)*. Alternatively, a military judge may deny a defense suppression motion under the

inevitable discovery doctrine if assured that "the routine procedures of a law enforcement agency would inevitably find the same evidence, . . . even in the absence of a prior or parallel investigation." *United States v. Owens, 51 M.J. 204, 210-11 (C.A.A.F. 1999).*

In the present case, the Government established that at the time of the alleged unlawful search, law enforcement officers possessed evidence that would have inevitably led to the discovery of the evidence pursuant to a valid probable cause search under M.R.E. 315(a). Prior to searching the Weston home under the now disputed consent provided by Appellant's wife, law enforcement officials possessed the following information, more than sufficient to establish probable cause, that would inevitably have led to discovery of the evidence at issue: (1) Staff Sergeant (SSgt) ME -- the victim of Appellant's concealed photography -- reported to the military police the highly unusual fact that in the shared restroom attached to the office she occupied with Appellant, she had located a micro-camera hidden inside an electric razor; (2) based upon her personal knowledge of Appellant, she identified the razor with the concealed camera as Appellant's property and presented it to the military police; (3) upon presentation of the razor and concealed camera, SSgt ME informed agents in the Criminal Investigation Division (CID) that Appellant had "an extensive knowledge of computers" and that she had seen

similar surveillance cameras in his home on prior occasions; (4) SSgt ME told the military police that after discovering the concealed camera, she contacted Appellant's wife, warned his wife of her suspicions, and was told by his wife that Appellant had locked himself in the home computer room for approximately one hour after work that day; (6) law enforcement officials then determined that in view of Appellant's extensive knowledge of computers, they needed "to get to his computer as soon as possible"; (7) a law enforcement officer stationed at the Weston residence met Appellant and his wife outside their home and they accompanied the officer to the CID office; (8) at the CID office, Mrs. Weston presented the officers with two items -- a working electric razor and an adaptor used to download images taken by the micro-camera -- in effort to show that Appellant must have accidentally taken the micro-camera razor to work instead of the operating razor.

This evidence, which was presented to the military judge in the course of the suppression motion, demonstrated that law enforcement authorities had ample probable cause to search and seize Appellant's home computer -- particularly as it was more likely that he would have viewed any images on his home computer rather than on the routinely-monitored government computer he used at work. As we noted in *United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007)*, probable cause "requires more than bare suspicion, but something

less than a preponderance of the evidence." The evidence available to the law enforcement officials readily met that standard and provided probable cause to believe that Appellant used an electric razor to hide a micro-camera in the restroom that he shared with SSgt ME; that the micro-camera was used to take pictures of SSgt ME during her private use of the bathroom; that Appellant used an adaptor to download images from the hidden micro-camera; that he brought the adaptor to his home; and that he used the adaptor and his home computer to view images of SSgt ME during her private use of the bathroom. Combined, these facts "lead one to believe that it [was] more probable than not that contraband [would] be present" in Appellant's marital home. *Leedy, 65 M.J. at 213.*

In light of this information, the evidence presented by the Government at trial established that the military police possessed knowledge that would have led to a lawful search of the Weston home in compliance with routine police practices. *See Owens, 51 M.J. at 210-11; Kozak, 12 M.J. at 394.*

Appellant suggests that discovery was not inevitable because the evidence could have been intentionally or inadvertently destroyed during the period in which the law enforcement officials would have sought issuance of a search authorization. The speculative possibility that a suspect might have destroyed evidence, however, does not preclude

application of the inevitable discovery doctrine in view of the fact that law enforcement officials may institute a temporary, warrantless seizure of the premises in such circumstances. *Illinois v. McArthur, 531 U.S. 326, 331-34, 337, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001)* (finding permissible temporary seizures of property supported by probable cause and designed to prevent the loss of evidence while police obtain search authorization).

In view of these considerations, I would affirm on the basis that the record establishes facts under which the evidence at issue was admissible pursuant to the inevitable discovery doctrine.

ERDMANN, Judge (concurring in the result):

Because I would find that the search in this case violated Weston's *Fourth Amendment* rights, I respectfully disagree with the holding of the majority opinion. However, I agree with that portion of the Chief Judge's opinion concurring in the result pertaining to inevitable discovery because I agree that the evidence would have been inevitably discovered and thus admissible under Military Rule of Evidence 311(b)(2). I therefore concur in the result.

The *Fourth Amendment* protects against unreasonable searches and seizures, and "[a]t the very core stands the right of a man to retreat into his own home and there be free from, unreasonable

governmental intrusion." *Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961).* "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)* (citations omitted). A well recognized exception to a warrantless search, however, is one in which an individual whom the police reasonably believe possesses common authority over the premises consents to the search. *Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); see also United States v. Matlock, 415 U.S. 164, 170, 177 n.14, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).* The issue presented in this case -- whether consent by one tenant is valid against another tenant who has already refused such consent -- is an area of law that is still in development.

Staff Sergeant Weston came home to find a military policeman stationed outside his family's home. The military policeman told Weston that his presence was requested at the military police station. Weston and his wife then drove to the station, followed by the military policeman. Upon their arrival, Weston and his wife were separated, and Agent Stevenson took Weston to her office to question him. Stevenson informed Weston of the offenses he was suspected of committing and advised him of his rights under Article 31, Uniform Code of

Military Justice (UCMJ), *10 U.S.C. § 831 (2000).* Having received this rights advisement, Weston invoked his right to remain silent and to consult with an attorney. Despite this clear invocation, Stevenson then sought Weston's consent to search his marital home. Weston unequivocally objected to any search.

Following Weston's objection, Stevenson left him in her office and went to speak with Mrs. Weston. Stevenson obtained Mrs. Weston's consent to search the couple's home without informing her that her husband had refused to give his consent. Mrs. Weston testified that she thought that her husband had given his consent to the search. After Stevenson had obtained Mrs. Weston's consent, she had Weston escorted from her office to the holding area of the military police station. There Weston used his cell phone to call an attorney friend, but the call was observed and Stevenson took his cell phone away. Several agents then left with Mrs. Weston and went to the couple's marital home where they commenced the search. Weston was detained incommunicado in the holding area at the military police station during this period of time.

The majority opinion finds that *Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006)*, does not control the outcome in this case as Weston was not physically present at his home when he objected to the search. *United States v. Weston*, M.J. (8-10) (C.A.A.F. 2009). In

*Randolph*, both the husband and wife were present at the threshold of the home and the husband objected to the search while his wife consented. *Randolph, 547 U.S. at 107.* The Supreme Court held that a physically present cotenant's consent was invalid where another physically present cotenant objected. *Id. at 120.* The decision did not address the situation where two cotenants were asked for consent to search while at a police station and one objected and the other consented. While *Randolph* is factually distinguishable from this situation, it does provide some general *Fourth Amendment* guidance in this area.

In analyzing cotenant consent cases after *Randolph*, courts have disagreed as to whether *Randolph* applies only to those situations where the objecting cotenant is present at the premises to be searched or whether it is equally applicable to a cotenant who has objected but is not physically present at the premises. [1] Under the circumstances of this case, that determination need not be made as *Randolph* contained the following exception:

> So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no

> fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

*Id. at 121-22.* [2]

1 *Compare United States v. Henderson, 536 F.3d 776, 784 (7th Cir. 2008)* (holding a refusal to consent by a physically present tenant can be overcome by a cotenant's consent obtained after the objecting tenant is arrested and removed from the premises), *United States v. Groves, 530 F.3d 506, 511-12 (7th Cir. 2008)* (holding a refusal to consent by a physically present tenant can be overcome by a cotenant's consent obtained two weeks later when the police returned at a time that they correctly believed the objecting tenant would be absent), *and United States v. Hudspeth, 518 F.3d 954, 961 (8th Cir. 2008)* (holding a physically present tenant's consent to search the home is valid against a prior refusal to consent, given away from the home, from a cotenant), *with United States v. Murphy, 516 F.3d 1117, 1124 (9th Cir. 2008)* (holding a cotenant's arrest and removal from the location does not "vitiate the objection he had already registered to the search"), *and Martin v. United States, 952 A.2d 181, 188 (D.C. 2008)* (holding the police are bound by a cotenant's refusal even when faced with a

subsequent consenting cotenant, unless the objecting tenant makes a clear statement changing his position) (citing *Murphy, 516 F.3d at 1125*)).

2 While I do not reach the issue as to whether an objection registered away from the home is vitiated by a subsequent consent by a cotenant, a compelling argument can be made that *Randolph* is based more on the stated positions of the cotenants rather than their physical proximity to the premises to be searched. The *Randolph* Court recognized two "complementary rules, one recognizing the cotenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it." *Randolph, 547 U.S. at 121-22.* Here consent was sought from both cotenants at the police station at essentially the same time. The fellow occupants were both on hand. The police did not have to wonder whether Weston would consent because they asked him first for permission to search his home and he refused. Weston expressed his "contrary indication," and there is a compelling argument that his objection should be accorded "dispositive weight." *See id.*

After Weston objected to the search, officers obtained consent from his wife without informing her that her husband had just refused consent. While the officers went to the marital home and commenced the search, Weston was detained at the military police station incommunicado. During the search Weston's wife received a phone call from the lawyer whom her husband had talked to on his phone before it was taken away. She learned that her husband had not given his consent to the search and was told she could revoke her consent to the search, which she did.

The question here is whether there is "evidence that the police . . . removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection . . . ." *Randolph, 547 U.S. 121.* There is no question as to whether there was a "possible objection" since the police were fully aware that Weston had objected to the search and would not give his consent. While Weston was not under arrest, he was detained at the military police building in the holding area and deprived of his cell phone during the period of the search.

If, as the majority holds, physical presence is required to overcome a cotenant's subsequent consent, then a situation where law enforcement officers keep an objecting cotenant from returning to his marital home where he could again voice his objection and do not allow him to communicate that

objection to his spouse falls clearly within the *Randolph* exception. Faced with a similar situation, the United States Court of Appeals for the Ninth Circuit held "[i]f the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made." *Murphy, 516 F.3d at 1124-25.* In this case, Weston was not even under arrest.

While the majority opinion relies' on an earlier Supreme Court case involving the issue of a cotenant's consent to search a premises, *Weston*, M.J. at (9) (citing *Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242*), I do not believe that case to be controlling. Matlock was arrested on the front lawn of the house, *Matlock, 415 U.S. at 166*, and placed in a nearby police car. *Id. at 179* (Douglas, J., dissenting). The arresting officers subsequently approached the house, spoke with a resident who shared a bedroom with Matlock, and received permission to search that bedroom. *Id. at 166.* The police did not ask Matlock for his consent to search the bedroom, nor did he offer it. *Id.* The Supreme Court recognized the consent of the cotenant may be valid against a cotenant who has not objected. *Id. at 170; see also Rodriguez, 497 U.S. at 179-80, 186* (holding cotenant's consent to search valid where Rodriguez, who was asleep inside the house, was not asked for his consent if police reasonably believed

the consenter possessed common authority over the premises).

This case differs from *Matlock* and *Rodriguez* in at least one critical aspect -- neither Matlock nor Rodriguez were asked whether they would consent to a search. Here Weston unequivocally objected to a search of his premises. This distinction illustrates an important difference in this line of cases between "nonconsenting" cotenants and "objecting" cotenants.[3]

> 3 In *Matlock* the Court referred to those cotenants who had not been asked nor otherwise had informed law enforcement as to whether they consented or objected to the proposed search as "nonconsenting" cotenants. *Matlock, 415 U.S. at 170.* On the other hand, "objecting" cotenants refers to those cotenants who have voiced their objection to the search to law enforcement officers. *See Randolph, 547 U.S. at 121-22; Murphy, 516 F.3d at 1124.* The majority categorizes these distinct factual situations under the generic umbrella term "nonconsenting" and does not include Weston's refusal to consent in its reasonableness analysis. *Weston*, M.J. at (11) (stating "[a]s in *Matlock*, Appellant was a nonconsenting party"). While the majority contends that reasonableness is a "binary proposition" where "either there is consent or there is not," *Id.* at

> (9), *Randolph* illustrates that is not always the case. The Supreme Court did not state that the factual situation in *Randolph* was the only situation where the objection of the defendant cotenant trumps another cotenant's consent. In my view, Weston's unequivocal refusal is significantly distinct from cases where the defendant was not a party to the consent inquiry. Matlock and Weston are not similarly situated defendants.

The Supreme Court noted in *Randolph* that "'it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.'" *Randolph, 547 U.S. at 115* (citations omitted). Given that special protection and the fact that Weston was detained by the police while his house was searched, I would find that the actions of law enforcement violated Weston's *Fourth Amendment* rights. However, for the reasons set out in the Chief Judge's separate opinion, I believe that the evidence would have been inevitably discovered and therefore I concur in the result.